Supreme Court of the United States

OCTOBER TERM, 1922

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,

v.

INTERNATIONAL TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI
(TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK AND COMMONWEALTH OF MASSACHUSETTS)

EDWARD F. McCLENNEN,
For the Petitioners.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1922.

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,

v.

INTERNATIONAL TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI
(To the Superior Court for the County of Suffolk and Commonwealth of Massachusetts.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners Samuel A. Myers and Harry Myers as co-partners under the name of S. A. and H. Myers of Boston in the County of Suffolk and Commonwealth of Massachusetts, respectfully petition this Court for a Writ of Certiorari to require that there be certified to this Court for review and determination the cause the record of which remains in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts, numbered 104991, wherein your petitioners were the defendants, and the respondent the International Trust Company — a corporation organized under the laws of the Commonwealth of Massachusetts and having a usual place of business in said Boston, was the plaintiff; and wherein final judgment has been entered against your petitioners pursuant to a decision of the Supreme Judicial Court for the said Commonwealth rendered in June, 1922.

This action was begun in the Massachusetts Superior Court by the International Trust Company against the petitioners

to recover a balance of loans obtained by the petitioners, — it was alleged, — by false representations. The petitioners had theretofore been discharged in bankruptcy on the confirmation of an offer in composition. The plaintiff claimed that this discharge was not a bar because the loans were obtained upon a false statement in writing made by the petitioners to the plaintiff. The action was tried before a jury on the issue of falsity of the statement, and the jury returned a verdict for the plaintiff for $14,304.49.

At the trial, the petitioners offered in evidence a bankruptcy record. It was excluded but was made by reference a part of the bill of exceptions, subsequently allowed. From the bankruptcy record the following facts appear.

In January, 1917, an involuntary petition in bankruptcy was filed against the petitioners. They made an offer of 40 per cent in composition. This offer was referred to the Referee in Bankruptcy. A majority of the creditors accepted the offer. The Referee recommended its confirmation. Thereupon, on March 23, 1917, the petitioners filed an application for confirmation of the composition. The plaintiff International Trust Company, by its Counsel, John R. Lazenby, counsel in the case at bar, entered an appearance in opposition to confirmation and assigned as a specification of objection that the petitioners had obtained loans from the plaintiff "by the statement made in writing to the International Trust Company, that on the first day of January, 1916, the accounts receivable amounted to $58,425.06; that the alleged bankrupts in said statement set out that they owed notes payable amounting to $59,713.12; that the alleged bankrupts did not include in said item of notes payable a note of $3,000, secured by a mortgage of certain real estate, and said statement was materially false and was made for the purpose of obtaining the aforesaid sums on credit." "Said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of $20,000, the exact sum being unknown to your petitioners, had been assigned and set over to the Commercial Investment Trust, and further, that

the accounts receivable as set forth in said statement do not amount to the said sum of $58,425.06."

These objections were referred to the Referee. He heard the petitioners and the plaintiff International Trust Company. He found and reported that the petitioners had made the financial statement of March 27, 1916, and that the International Trust Company relied on it in making the loans, but that when the financial statement was made it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time and kept by an experienced, competent bookkeeper, and that —

> "I do not find any evidence that the bankrupts or either of them falsely or purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Trust. I therefore find and so report, that according to the method of bookkeeping employed by the alleged bankrupts, the amount of the accounts receivable, January 1, 1916, was correctly set forth in said statement. I therefore find, and so report, that this objection is not sustained."

The Referee reported the testimony, and this testimony was substantially the same testimony which was introduced at the trial, in the Superior Court, of the case now at bar.

The case was heard in the Bankruptcy Court by the District Judge after the return of the report of the Referee. The District Judge confirmed (245 Fed. 110) the finding of the Referee, that the petitioners did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit, and decided that it was not the duty of the defendants to state the fact of the assignment, but that the creditor, if it considered the point material, ought to have inquired about it and that the statement ought not to be extended by implication to include recitals which it did not contain and which were never made by the alleged bankrupts, the petitioners.

Accordingly, on May 28, 1917, the District Court confirmed the composition.

The International Trust Company appealed to the Circuit Court of Appeals for the First Circuit. That court accepted the reasoning and conclusions of the District Judge and affirmed the order confirming the composition (245 Fed. 110, 112). A judgment was entered accordingly, with a mandate to the District Court. This judgment was "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge."

The petitioners, in offering this record and in excepting to its exclusion, contended that the effect of this record as an estoppel was to be determined by the laws of the United States. At the close of the evidence in the Superior Court the petitioners also requested and the court refused, subject to the petitioners' exceptions, these requests for instructions, namely:

> "10. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendant's offer in composition establishes conclusively for the purposes of the present case that the statement was not false."
>
> "11. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendants' offer in composition establishes conclusively for the purposes of the present case that the statement was not made with an intention to deceive."
>
> "8. The mere failure to state that the accounts had been assigned as collateral security to the Commercial Investment Trust would not make the statement false."
>
> "12. The discharge of the defendants by the confirmation of the composition is a bar to this action."

The evidence at the trial in the Superior Court, like the evidence at the trial in the Bankruptcy Court, showed the following facts:

The petitioners were a partnership engaged in the manufacture of clothing. They dealt with the plaintiff as a bank of deposit and also borrowed money from it.

On March 27, 1916, in response to a letter from the plaintiff, the petitioners sent a statement of their financial condition, January 1, 1916, prepared by the petitioners' bookkeeper and in accordance with the petitioners' books.

In the preceding July the petitioners had entered into a contract with the Commercial Investment Trust, under which this Trust agreed "to make advances to first party upon the assignment to it as collateral security therefor" of the petitioners' accounts receivable.

In the financial statement of January 1, 1916, the item of accounts receivable was the amount of accounts receivable which the petitioners then actually had. No deduction was made from that amount for those accounts which had been assigned as collateral security under this contract with the Commercial Investment Trust. On the other hand, the accounts payable, as shown on the statement, included an amount equal to all accounts which had been so assigned for the advances which this Trust had made to the petitioners.

Accordingly, the net capital was not overstated.

The petitioners, under the arrangement with the Commercial Investment Trust, continued to hold and to collect these collateral accounts, remitting the proceeds to the lender in reduction of the loans.

The petitioners did not have any conversations with the plaintiff's officers or say anything beyond what appeared in the financial statement itself.

The petitioners testified that they had no intention to deceive the plaintiff.

The petitioners testified that on receiving the request for a statement they turned it over to the bookkeeper and asked him to get out a statement and gave no directions to him, and that they believed that the statement as they signed it was true.

Glass, the bookkeeper, called as a witness by the plaintiff, testified on cross-examination that he believed that the statement was true and that he had no intention to deceive.

The contract with the Commercial Investment Trust contained provisions for the payment of interest at rates determined by the amount of accounts assigned during the course of a year. As the amount so assigned exceeded $100,000, the interest actually paid was one-thirtieth (1–30) of one per cent (1%) a day on daily balances, — that is, 12 per cent a year.

All loans made by the plaintiff to the petitioners during the six months following the receipt of the financial statement were repaid. The first loan still remaining in part unpaid was made October 2, 1916.

The plaintiff claims that the statement was false because it did not call attention to the contract with the Commercial Investment Trust and to the terms of this contract, and to the fact that some of the accounts receivable were held by this Trust as collateral for advances. It was this claim of the plaintiff that the petitioners contended had been conclusively determined against the plaintiff by the decision of the District Court of the United States and by the decision of the Circuit Court of Appeals.

The petitioners took the case to the Supreme Judicial Court of Massachusetts by bill of exceptions which duly presented the petitioners' contention, that the estoppel by judgment was to be determined by the laws of the United States, that the exclusion of the record of the United States Courts was erroneous, that the mere failure to state that the accounts had been assigned as collateral security would not make the statement false, that the finding of the United States Court established conclusively that the statement was not false, and that it was not made with an intention to deceive, and that the discharge was a bar.

The Supreme Judicial Court overruled your petitioners' exceptions and sent down its rescript of such action to the Superior Court, and pursuant thereto final judgment was entered on the verdict for the plaintiff in June, 1922.

The decision of the Supreme Judicial Court is against the petitioners' claim (1) that the statement was not false within the meaning of that term as used in Section 17, Clause 2 of the Bankruptcy Act; and (2) that the decision of the District Court of the United States and the decision of the Circuit Court of Appeals were to be given effect to establish conclusively that the statement was not false and was not made with an intention to deceive; and (3) that the discharge in bankruptcy was a bar.

The reasons relied on by your petitioners for the issuance of a writ of certiorari, and upon which your petitioners believe that this petition ought to be granted, are:

(1) That in said action the petitioners claimed a right, privilege and immunity under the constitution and statutes of the United States, namely, that the Circuit Court of Appeals of the United States for the First Circuit, affirming a decree of the District Court of the United States for the District of Massachusetts, had decided conclusively in a suit between the same parties that the representations made by the petitioners were not false and the petitioners were entitled under the constitution, statutes and laws of the United States to have full effect given this decision in the suit at bar as establishing that fact; whereby, by a discharge in bankruptcy granted these petitioners on the confirmation of an offer in composition in said District Court, the petitioners had a complete defense and the decision of said Superior Court, affirmed on exceptions by said Supreme Judicial Court, was against the said right, privilege and immunity; and

(2) That said decision is in conflict with the decisions of this Supreme Court of the United States on the same question, and also it involves a question of general public importance, namely, the rights of persons discharged on confirmation of composition under the Bankruptcy Act of the United States after the Courts of the United States have rendered judgments in their favor on questions of fact and of law essential to the granting of the discharge; and the judgment of the Massachusetts Court, tends to bring into contempt for inefficacy the judgments rendered (on the same issue between the same parties) of the Courts of the United States.

Your petitioners present herewith a certified copy of the entire record in the said cause, including the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts and the record referred to therein of the District Court of the United States and of the United States Circuit Court of Appeals.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said decision of the Supreme Judicial Court of the Commonwealth of Massachusetts and the judgment of the Superior Court for the County of Suffolk in said Commonwealth, be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

SAMUEL A. MYERS,
HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,

By their Attorney,
EDWARD F. McCLENNEN.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, SS.

Edward F. McClennen being duly sworn deposes and says that he is the counsel for the above-named petitioners and that the matters set out in the foregoing petition are true of his own knowledge.

EDWARD F. McCLENNEN.

Subscribed and sworn to
before me, this sixth
day of July, 1922.
GEO. P. DAVIS,
Notary Public.
My commission expires March 12, 1926.

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the Writ of Certiorari prayed for.

EDWARD F. McCLENNEN,
Counsel for the Petitioners.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.

SAMUEL A MYERS AND HARRY MEYERS,
CO-PARTNERS AS S. A. & H. MYERS,

v.

INTERNATIONAL TRUST COMPANY.

ACCEPTANCE OF SERVICE.

International Trust Company, by its attorney of record, hereby accepts service of notice that a Petition for Writ of Certiorari in the above entitled cause will be applied for in this Court on July 31, 1922 and will be submitted to this Court at the opening of the Court at its first sitting thereafter, or as soon thereafter as counsel can be heard in pursuance of its rules in such cases made and provided, and that said respondent has received a copy of this petition and the brief in support thereof and of the entire transcript of the record of the case.

Dated the sixth day of July, 1922.

JOHN R. LAZENBY,
Attorney for the Respondent.

SEP 2

Supreme Court of the United States

No. 5[redacted]89

OCTOBER TERM, 1922

SAMUEL A. MYERS and HARRY MYERS
copartners, as S. A. & H. MYERS
Petitioners

v.

INTERNATIONAL TRUST COMPANY
Respondent

Brief in Opposition to Petition for Writ of Certiorari

JOHN R. LAZENBY
For the Respondent

The Corporation Press, Inc., Cooperstown, N. Y.
New York City Office, 220 Broadway.

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Supreme Court of the United States

October Term 1922. No.

SAMUEL A. MYERS and HARRY MYERS, copartners, as S. A. & H. MYERS,
Petitioners,
v.
INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The Myers are defendants in an action of tort founded upon a claim that the Myers had obtained money from the International Trust Company, by reason of fraudulent representation intentionally made for the purpose of obtaining the money. The case was tried before a jury which rendered a verdict in favor of the International Trust Company. The Myers by exceptions took the case to the Supreme Judical Court of the Commonwealth of Massachusetts, which after argument overruled the exceptions. The Myers now bring this petition for a writ of certiorari on the ground that:

(1) The Trial Court and the Supreme Court failed to allow the claim of the Myers to a right, privilege and immunity under the statutes of the United States by ruling that a confirmation of a composition in bankruptcy did not bar the claim of the International Trust Company, and

(2) That the decision of the Trial Court and of the Supreme Court is in conflict with the decisions of the Supreme Court of the United States and, consequently, tends to bring into contempt for inefficacy the judgments rendered in the Courts of the United States.

The petitioners also ask this Court to review the evidence and to decide that there was no evidence upon which the jury in the Trial Court was warranted in finding that (a) the statement was false, and (b) the petitioners deliberately and intentionally deceived the Bank.

The facts upon which this litigation arose were as follows:

The International Trust Company is a Bank carrying on a banking business in Boston, Massachusetts. The Myers were a partnership carrying on a clothing business in Boston. Prior to 1910 the Myers had dealt with the Bank, keeping a deposit and obtaining loans from time to time. This practice continued through the year 1916, the method of doing business being that the Myers submitted each year a statement of their financial condition for the purpose of giving information to the Bank as to whether they were a reasonable risk for such loans as the Bank might make. These statements appear in evidence in Exhibits 1 to 5 (Rec. pp. 15, 16, 17).

In March, 1916 the Myers applied to the Bank for credit, and the Bank by a letter dated March

22, 1916 requested that the Myers furnish upon a form enclosed a statement of their financial condition (Exhibit 9) (Rec. pp. 17, 18.) The Myers did not use the form but made up a statement of their own and submitted that (Exhibit 6). Upon the one so made and upon the statements on file the Bank discounted notes and paid the Myers $20,000 (Rec. p. 20). The form of statement which had been enclosed in Exhibit 9 had on it the question:

> "Are any of above assets pledged or liabilities secured by collateral judgment notes or otherwise?" (Rec. p. 29).

In February, 1917 the Myers were petitioned into bankruptcy and immediately offered a composition, which composition was finally confirmed and a dividend paid. The Bank proved its claim *on the notes* and received its dividend (Rec. p. 25).

On July 22, 1915, the Myers had made an agreement with the Commercial Investment Trust of New York (Exhibit 8) whereby the Myers obtained from the Trust advances from time to time of sums of money on an assignment of accounts due the bankrupt for merchandise which they had sold (Rec. p. 17). The agreement is long and complicated, but it appears that the practice was for the Myers to sell their products, send out the bills and send a duplicate of the invoice to the Trust (Rec. p. 17). The Trust then paid 78% of the amount of the invoice, although by the terms of the agreement they were required to pay 80%, the 2%, however, being retained by the Trust as a reserve fund for interest and expenses and was adjusted later (Rec. p. 26). Upon the receipt by the Myers of payment of any account which they had assigned to the Trust this payment was remitted to the Trust which paid off its

advances and charges, and refunded the balance to the Myers.

The rate of interest which the Myers were to pay was crushing. The agreement provides for 6% upon the sum advanced and in addition expenses and commissions which expenses and commission shall be 1% of the face amount of the accounts assigned for the first 15 days, and one-half of one per cent of the first $100,000 face value of accounts assigned, and 1/30 of one per cent per day of the face amount of all accounts during the time while such accounts were held by the Trust (Exhibit 8). In brief, the Myers were paying more than 18% on all sums advanced. This agreement was in full force and effect during 1916 at the time the statement (Exhibit 6) was made, and at the time the money was borrowed from the International Trust Company, but the Myers kept the fact that there was such an agreement and the contents of it entirely concealed, and permitted the Bank to advance the $20,000 in ignorance of the fact that they had "hocked" their accounts receivable.

The statement (Exhibit 6) contained no word of this assignment but on the contrary induced any person examining it to believe that no such agreement was in existence. The statement set out that the Myers had accounts receivable on January 1, 1916, of $58,425.06, although the truth of the matter was that on that date the Myers had assigned $27,000 of these accounts (Rec. p. 23). In short, the statement set forth that among the assets were accounts receivable drawing interest, while the truth of the matter was that of those accounts receivable $27,000 were costing the Myers 18% in interest. On the day the statement was given to the Bank, March 27, 1916, this $27,000 had risen to $46,441.13, so that the accounts receivable owned by them on the 27th of March

were actually less than half of what the statement showed (Rec. p. 23).

To balance the statement it was necessary to place these sums among liabilities and, consequently, they were put in among accounts payable, (Rec. p. 27), although accounts payable have for the usual and ordinary meaning sums due on account of merchandise, labor, etc., (Rec. pp. 18, 23), and not money loaned at 18% interest, (Rec. p. 23) as the Myers well knew.

Under such circumstances the Bank brought suit to recover the damage which it had suffered by reason of the misrepresentation. The defendants denied the fraud, and in addition set up that the debt was discharged by reason of the composition in bankruptcy and, further, that the Bank had objected to the confirmation of the composition on the ground of fraud, and that the confirmation of the composition in the Bankruptcy Court was *res adjudicata* on the question of fraud.

It should be noted that the Bank brought its suit to recover damages by reason of the fraud perpetrated upon it and not to recover on the notes.

ARGUMENT

I

The petition should be dismissed.

While the Bankruptcy Act defines what debts are discharged by the Act and what debts are not, it is not usual to permit a party dissatisfied with the findings of a jury which acted under proper instructions to ask the United States Supreme Court to review the findings of fact of that jury, particularly when the State Supreme Court has held in a unanimous opinion that there was ample evidence to warrant the jury reaching its verdict. The question is not one of general importance.

The questions involved in this case have already been decided in *Friend v. Talcott,* 228 U. S., 27, and no reason is given in the petition for the reopening of that decision. The Supreme Judicial Court of the Commonwealth of Massachusetts and the United States Courts have had no difficulty in following the decision.

II

There was ample evidence from which the jury was entitled to find that the Myers obtained money with the intention to deceive by means of a false statement.

The petitioners do not claim that there was error in the instructions which were given to the jury on this question or that the Trial Court or the Supreme Judicial Court did not follow the United States Courts in the definition of the fraud which the Trust Company must prove in order to

satisfy the Bankrupt Act (Rec. pp. 32, 33, 34, and 35. Requests for instructions No. 3, 4, 5 and 6 at Rec. p. 35).

It is claimed by the Myers that the statement was not false.

The Bank alleged that it had been deceived by reason of the Myers failing to give information as to a material change in the method of doing business by concealing the fact that the Myers had assigned accounts receivable, by giving a statement which was in itself false, not only by not setting forth a true, accurate and complete statement of their financial condition, but also by having absolutely false entries in the statement itself.

The Trial Court held that there was sufficient evidence upon which the jury might find that the statement was false. The Supreme Judicial Court was satisfied that the Trial Court was correct.

The Bank in its letter of March 22, 1916, (Exhibit 9), asked the Myers "to send us on the enclosed form statement of your financial condition."

The statement purported to be "a copy of our financial statement taken from inventory, January 1, 1916". It shows accounts receivable of $58,425.06. Samuel Myers testified (Rec. p. 18):

> "Accounts receivable meant accounts due us from customers for garments and clothing which we had sold and shipped to them"

Glass, the bookkeeper in charge of the books of the Myers, testified (Rec. p. 23):

> "At the time the statement of March 27, 1916, Exhibit 6, was made, I think something like $27,000 of accounts receivable had been assigned as of 1st January, 1916. The books show that on March 27th, I should say we had assigned accounts to the extent of $46,441.13."

Samuel Myers testified (Rec. p. 17):

> "It (item of accounts receivable) also contained all the accounts which we had assigned. It included the notes which we had assigned to the Investment Trust."

There can be no question from this testimony that the statement was false in that it set forth that the Myers owned accounts receivable when the fact was that they did not.

Further, the statement showed that the Myers owed accounts payable (Exhibit 6).

Myers testified (Rec. p. 18):

> "Accounts payable meant accounts owed by us for merchandise which we had bought."

Glass testified (Rec. p. 23) that the accounts payable meant money owed for services, merchandise and that the general accepted term "accounts payable" would not be interpreted according to the ethics of accountants as including money which had been borrowed. Glass further testified (Rec. p. 24):

> "The money received from these assigned accounts was not an obligation to pay for merchandise."

The fact was that this item included the money which the Myers owed the Commercial Investment Trust for money advanced by that Trust upon which they were paying 18% interest, although, as Myers testified (Rec. p. 18):

> "The item notes payable in the statement (Exhibit 6) represents money borrowed whether we gave a note or not."

The item for notes payable clearly represented that the only money borrowed was included in that item.

In short, the statement represented that on Jan-

uary 1st the Myers owned $27,000 of quick assets and on the 27th of March, $46,441.13, while as a matter of fact they did not. It concealed entirely the fact that the Myers were paying 18% interest on money which they had borrowed.

Further, the statement was false in the general representation which it held out.

The Myers had been dealing with the International Trust Company for fifteen years or more, and had been discounting notes and borrowing money from time to time. They had given a financial statement each year (Rec. p. 15). In 1903 they were asked if any accounts were assigned (Rec. p. 18); when they made this statement (Exhibit 6), they were asked in the form which came with the letter (Exhibit 9) "are all bad or doubtful assets included in above statement? Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise?" In 1903 they had answered that they had not assigned accounts, and in 1916 by their failure to use the form sent by the Bank they represented to the Bank that the answer to both these questions was in the negative.

Jewett, the officer of the Bank who passed upon the question of loans to be made to the Myers, testified:

> "These (Exhibits 1 to 6) are the statements I used in giving credit to the Myers. * * * Prior to October 1916, I did not have any conversation with them (Myers) as to the discounting of notes. When I discounted the notes in question I relied upon the signed statement on file to determine whether credit should be given to the Myers. I did not limit it to one statement, but relied on this throughout a number of years. When I passed on the statements I relied on the accounts receivable as having the ordinary and usual meaning in business. * * * At

> the time the notes were presented I had no information that the Myers had assigned their accounts receivable to the Commercial Investment Trust. The Myers did not disclose in any form any information that they had assigned their accounts receivable. The statement in Exhibit 6 did not show that certain accounts receivable had been assigned" (Rec. p. 20).

He further testified that he did not know the Myers were paying interest at the rate of 16% to 18% for money borrowed, nor did the Myers give any information in regard to that rate, otherwise

> "we would not have discounted those notes. I have had experience in discounting and banking and my experience has been that when persons pay 16% to 18% for money they are in a bad condition" (Rec. p. 21).

In July, 1915, the Myers had made this agreement with the Commercial Investment Trust and proceeded to assign accounts from time to time, always in increasing amounts. As Samuel Myers testified:

> "When I gave the notes, Exhibit 7, to the Trust Company I did not at any time tell them of this agreement with the Commercial Investment Trust or that we were putting up our accounts receivable for money loaned to us" (Rec. p. 18).

There can be no question that the statement was false, not only as set forth above but also in the amount of the "net capital" of $83,510.33, for with such a capital it would have been entirely unnecessary to have inaugurated the system of assigning the accounts receivable. Further, it completely failed to set out a change in the method of doing business and the mere fact of it being delivered to the Trust Company in silence led the

Trust Company to believe that the Myers were carrying on their business in the old reliable and honest way.

The Myers urge that there was no evidence of intention to deceive (Brief p. 9).

From all the evidence there can be no question that the Myers intended to get money upon a statement which they knew to be false and intended to deceive.

Samuel Myers testified:

> "I intended that the International Trust Company rely on it (the statement) as being accurate and true. I gave it (the statement) to them so that they would know our condition" (Rec. p. 19).

Glass, the bookkeeper, testified:

> "When this statement, Exhibit 6, was made, we intended that whoever saw it should rely on it, and that they should take it just as it was made out" (Rec. p. 27).

Samuel Myers knew that these statements were given to the Bank to enable the Bank to determine what their financial condition was (Rec. pp. 16 and 17). The form used in 1903 and that sent with the letter of March 27, 1916 contained direct questions as to whether the assets were pledged or accounts assigned. He knew that the form included in Exhibit 9 contained a similar question. He knew the meaning of accounts receivable and he knew that the item of accounts receivable in his statement (Exhibit 6) included all which he had assigned (Rec. p. 17). He testified how he conducted his business with the Commercial Investment Trust. He knew the terms of that contract including the fact that he was paying 18% interest. He knew of the various meanings of the terms in the statement and of the false entries. He knew of the change in his method of doing business. With all this knowledge he

remained silent and permitted the Trust Company to lend him money.

Nor can he shelter behind the testimony of his bookkeeper, Glass. Glass knew the terms of the Commercial Investment Trust agreement (Rec. p. 22); he knew the meaning of accounts payable and accounts receivable; he knew that $27,000 worth of accounts were assigned, and that the amount of these assigned accounts increased during the year 1916 to over $100,000 (Rec. pp. 23 and 27); he knew that the item accounts payable did not disclose the interest rate of 18% (Rec. p. 24). His testimony can leave no question that he was thoroughly familiar with the entire situation and with that form before him prepared the statement to be sent to the International Trust Company under the direction of Samuel Myers.

Any person charged with intentional fraud will stoutly deny that he ever intended to deceive, and the intention can be found only from what happened. Ample circumstances were put in evidence to clearly establish the deliberate intention to deceive. The cases cited by the petitioners, to the effect that the denial by Myers and Glass of the intention to deceive left no evidence upon which the jury could find a deliberate intention to deceive, have no application.

The Court will hesitate to review the findings of a jury which saw the witnesses and heard the manner in which these witnesses testified, or to set aside the rulings of the Trial Justice on questions of fact.

III

The confirmation of the composition did not discharge this debt.

At the time the International Trust Company made the advances it had two separate and distinct causes of action: (a) an action of contract founded upon the contractual obligations created by the notes, and (b) an action of tort founded upon the deceit of the Myers in inducing the bank ta pay money upon misrepresentations intentionally made.

The Bankruptcy Act recognizes these two distinct causes of action and discharges the debtor from his liability on the contracts and denies him the discharge from his liability for the deceit.

The petitioners in their brief, page 4, admit that the fraud would not be discharged by the composition; otherwise the suggestion that the bank might have ignored the composition and waited until after the confirmation before setting up fraud, would have no force. The Bankruptcy Act, Sections 14-b and -c, 17 and 63 provide that the confirmation of a composition does not release a bankrupt from liabilities for obtaining property by false pretenses or false representations.

The claim of the Trust Company upon which this suit was brought was *not* proved in the bankruptcy proceedings and dividends in composition were *not* received upon it. The statement at page 5 of the Petitioners' brief, "The respondents' claim relied on in the State Court was actually proved," is not correct. The claim proved in the bankruptcy proceedings was that founded on the notes.

The claim in tort was not provable.

In *Schall v. Camors,* 251 U. S., 239, commercial paper was sold by a partnership by means of false representations. Both the partnership and individual partners were petitioned into bankruptcy. The creditor proved his claim on the notes against the partnership estate. He also proved against the individual estates of the partners a claim for damages suffered by reason of the misrepresentation. Upon the petition of the trustee in bankruptcy the claim against the individual estates was rejected on the ground that this claim was one in tort and hence was not provable.

In *Talcott v. Friend,* 179 Fed., 676, (C. C. A. 7th), Affirmed, 228 U. S., 27. The debtor obtained credit for merchandise upon a statement which was false. It was held that the creditor could prove his claim in contract in the bankruptcy proceedings and also maintain an action after the bankruptcy proceedings to recover damages for the injury suffered by reason of the misrepresentation.

The fact that the Trust Company proved its claim on the contracts, the notes, does not affect this right to maintain this action of fraud.

In *Frey v. Torrey* 70 N. Y., App. Div., 166, aff'd in 175 N. Y., 501, the fact that the plaintiff had proved his claim in bankruptcy on a contract was held to be no bar to maintaining an action in the State Court for deceit.

Standard Sewing Machine Company v. Kattell, 132 N. Y. App. Div., 539.

In re Menzin, 238 Fed., 773, (C. C. A. 2nd).

Zimmern v. Blount, 238 Fed., 740, (C. C. A. 5th).

In re Groodzinsky, 248 Fed., 753, (D. C. Ga.).

Forsyth v. Vehmeyer, 177 U. S. 177.
Crawford v. Burke, 195 U. S., 176, 178.

The scope of the discharge which determines whether particular debts are included in the discharge or not has nothing to do with the question of whether a discharge shall be granted.

In re Lockwood, 230 Fed., 158, 160, (D. C., E. D. of N. Y.)

The present case is not one where the plaintiff may treat his cause of action as one *in assumpsit*, electing whether he will treat the fraud as a quasi-contract and waive the contract, but it is one where there are two separate and distinct rights which give rise to separate and distinct causes of action.

Kreitlein v. Ferger, 238 U. S., 21, cited in the Petitioners' brief at page 6 is no authority that the claim now before the Court was a provable claim. At page 27 it is said:

> "On the part of Ferger it is said that this suit is on a judgment for $300 rendered in an action not 'founded upon a contract express or implied—and it seems to have been claimed that the judgment was not a provable debt within the meaning of Section 63-a-4 of the Bankruptcy Act. But the special finding of the jury in that case showed that in purchasing the flour Kreitlein had not made any fraudulent concealment or misrepresentation as to his financial condition. Besides the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action *in trover*, as for a fraudulent conversion, instead of *assumpsit* for a balance due on open account. *Crawford v. Burke*, 195 U. S. 176, 193."

Crawford v. Burke, 195 U. S., 176, cited on page 6 of the Petitioners' brief, has no application to

the present case. It is a decision on the Bankruptcy Act before the Amendments of 1903. It holds merely that the Act as it then existed excepts from the operation of the discharge only judgments founded on a fraud and not claims based on fraud. The Act has since been amended to enlarge the scope of debts not discharged. Further, the cause of action was based on conversion of stock, so that the creditor had a right to elect whether he would sue in contract or in tort.

Tindle v. Birkett, 205 U. S., 183, is also a judicial determination of the statute before amendment, and the Court expressly states that *Crawford v. Burke* governs that decision.

IV

The decision of the United States District Court in Bankruptcy, in confirming the composition was not RES JUDICATA upon the question of fraud.

The Trial Court properly excluded the record in the bankruptcy proceedings.

Section 12-d of the Bankruptcy Act requires the confirmation of a composition, provided the bankrupt has not been guilty of any acts which will bar a discharge, and Section 14-b-3 refuses the discharge if the bankrupt has obtained money or property on credit upon a materially false statement in writing made to "any person or his representative" for the purpose of obtaining credit from such persons.

Any creditor may object to the confirmation of composition irrespective of whether the false statement was made to him or to another creditor.

In re Miller, 192 Fed., 730 (D. C., N. D., Ia.).

Talcott v. Friend, 179 Fed., 676, 681 (C. C. A. 7th).
In re Brener, 166 Fed., 930 (D. C., S. D., N. Y.).
In re Kretz, 212 Fed., 784, 786 (D. C., W. D., Wash.).

The jury has found that the statement was intentially false within the definition of the Federal cases construing the Bankruptcy Act.

The parties in the bankruptcy proceeding are not the same as the parties in this suit. It was the general mass of creditors against the bankrupt and not one particular creditor against the bankrupt.

The question at issue is not the same. The sole question in the bankruptcy proceeding was whether the debtor should be discharged from his provable debts, and not whether any particular debt was discharged. In the present case the sole question is whether the Myers had obtained money or credit from the plaintiff upon an intentionally false statement, and hence *whether this debt was a provable debt.* The cases cited above hold that it was not a provable debt.

The Bankruptcy Act brings this position out clearly. Section 14-b-3 provides that there shall be no discharge if property or credit has been obtained by reason of false statements in writing to the person giving the credit or property, but Section 17-a provides that a discharge does not release the bankrupt from liabilities for obtaining money by false representations or pretenses, even though not written. This shows clearly that the statute contemplates that certain acts shall be a bar to the discharge, and that certain other acts shall prevent the release of the bankrupt from the liability arising from them, although those acts

alone are not a bar to the discharge of the bankrupt.

In *Talcott v. Friend,* 179 Fed., 676, 681:

> "Objections to discharge may be made by any 'party in interest.' That term certainly includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. The third ground of objection is available if the bankrupt in the manner therein stated 'obtained property on credit from any person.' Any creditor may therefore urge this objection, whether he was the defrauded party or not. *In re Harr* (D. C.) 143 Fed., 421. The application for a discharge consequently tenders an issue to all parties in interest. If all remain silent, all are bound by the finding which follows the failure to present objections. All equally have the right and the opportunity to object; but if only one does so, he cannot keep the outcome to himself —all share in the result. Thus identity in interest of the parties to the application for discharge and objections thereto and the parties to this action for deceit is wanting. In the bankruptcy court the parties were the defendants in the capacity of insolvent debtors and the plaintiff in the capacity of a representative of all parties interested in opposing the discharge, while in this action the parties are the defendants in the capacity of fraud doers (separate and distinct from their character of contractors, as hereinbefore pointed out) and the plaintiff in the capacity of the solitary victim of their deceit. So, also, there is lacking an identity of issues, for in the bankruptcy proceeding the only proper issue was the bankrupts' right to a discharge as against all parties in interest. *In re Thomas* (D. C.) 92 Fed., 912; *In re Rhutassel* (D. C.) 96 Fed., 597.
>
> "Our conclusion, therefore, is that plaintiff's act in pleading defendants' deceit in

> opposition to the application for a discharge, and the aforesaid finding of the court with respect thereto, fail to bar plaintiff from maintaining this action."

In *Friend v. Talcott*, 228 U. S., 27, the facts are almost identical with the facts in the present case. A partnership, consisting of Friend and some others, was adjudicated bankrupt; the bankrupts offered a composition; Talcott, a creditor whose claim in contract had been allowed, objected to the composition on the ground that the bankrupts had obtained from him credit by means of false reports as to the financial condition of the firm. The objections were overruled on the ground that the statement was made to a commercial agency, and the composition was confirmed. Later Talcott brought suit to recover the damages suffered by reason of the false statement, relying on the same deceit set out in his objections to the composition, and the damages sought were the difference between the contract price and the amount which Talcott had received in the composition. The defendants in addition to the general issue set up *res judicata*.

The Court held that the action could be maintained and that the confirmation of the composition was not *res judicata*. At page 40 the Court said:

> "While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata*, that is, a confusion of thought arising from treating things which are different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right

of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects —that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge. . . .'

"Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to

> the statute as to the absence of fraud or other wrong doing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation."

The *Talcott* case is not distinguishable. The fact that the representation was made through a commercial agency, and that the Bankruptcy Court in confirming the discharge did not pass on the question of whether Friend had obtained credit by misrepresentation, does not make any difference. Both the Circuit Court of Appeals and Supreme Court considered this argument and rejected it, as appears from the portions of the opinions set out above.

Even conceding the defendants' argument that the case of *Friend v. Talcott* might have been decided on a narrow ground, the fact remains that the Court did establish exactly the principles for which the respondent contends in this case, and the respondent submits that the trial Court ruled properly in following this decision of the United States Supreme Court.

The Circuit Court of Appeals for the Second Circuit has followed the *Talcott* case in *in re Menzin*, 238 Fed., 773 (C. C. A. 2d).

In that case there was an order by the District Court staying petitioners from proceeding under their specifications filed in opposition to the bankrupts' discharge, unless they discontinued their action brought in the State Court. The debtor was adjudicated bankrupt and the creditor proved his claim for goods bought. The creditor then brought suit in the State Court to recover damages by reason of the bankrupt having obtained the goods in question on credit by fraudulent representations. The Court held that such a suit in the State Court could be maintained in spite of the fact that a claim in contract had been allowed in the bankruptcy proceeding.

At page 774 the Court said:

> "(3) We are quite clear that the petitioners may proceed with their suit in the state court in tort notwithstanding that they first proved their claims in bankruptcy on contract. In *Friend v. Talcott*, 228 U. S., 27, 33 Sup. Ct., 505, 57 L. Ed., 718, the Supreme Court held that a creditor who had unsuccessfully opposed a composition and discharge in bankruptcy, and who had accepted his dividend thereunder, might still sue for the balance of his claim in the state court, on the ground that the indebtedness was fraudulently contracted, and therefore excepted by the act from the operation of the discharge."

The interpretation of the *Talcott* case which the respondent urges is the same as already given by the Federal Courts.

In *Pell v. McCabe*, 256 Fed., 512 (C. C. A. 2d), at page 517, it is said:

> "*Friend v. Talcott*, 228 U. S. 27, 33 Sup. Ct., 505, 57 L. Ed., 718. In the case cited the Court holds that a creditor who had unsuccessfully opposed a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, and accepted a dividend, and who then sued for the balance on the ground that the debt was excepted from the discharge, had not waived his right to sue on the tort by accepting the dividend; and the Court also held that the granting of the discharge was not *res judicata* of the claim for the balance of the debt."

See also *in re Groodzinsky*, 248 Fed., 753 (D. C. N. D. Ga.), at pages 754, 755.

The petition should be denied.

Respectfully submitted,

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